DLA PIPER

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FEDERAL COURT MAKES FIRST DETERMINATION OF COMPENSATION FOR NATIVE TITLE

NATIVE TITLE UPDATE

SUMMARY

On 1 October 2013 in *De Rose v State of South Australia* [2013] FCA 988, the Federal Court made the first determination of compensation for the extinguishment of native title, in connection with a settlement reached between the claimants and the State of South Australia over an area in the far north-west of South Australia. While the financial terms of the settlement remain confidential, the decision demonstrates the role that determinations of compensation can play in native title settlements and provides some useful guidance regarding the Court's approach in an area that can be expected to see increasing activity.

BACKGROUND

The *Native Title Act 1993* (Cth) ("**NTA**") provides for applications to be made to the Federal Court regarding:

- whether or not native title exists in relation to any land and/or waters; and
- the compensation payable in relation to the effect on native title of anything done by any State, Territory or the Commonwealth, to the extent that those "acts" are validated by the NTA or complementary State and Territory legislation.

Thirty-seven compensation applications have been filed since the NTA commenced in 1994, covering various areas in all Australian jurisdictions other than Tasmania and the Australian Capital Territory. However, in all but one case in New South Wales in 2004 (where compensation was determined not to be payable), the applications have been dismissed or discontinued before a determination was made.

De Rose, which was brought on behalf of a group of Yankunytatjara and Pitjantjatjara people that were determined by the Federal Court in 2005 to be the holders of non-exclusive native title over De Rose Hill Station in the far north-west of South

Australia ("**De Rose Hill Native Title Holders**"), is the first instance in which the Court has determined that compensation was payable. While the determination is significant in its own right, it also provides an example of a particular framework for the settlement of liabilities for impacts on native title, as well as useful guidance regarding an area of native title law that is only now starting to be properly explored.

COMPENSATION UNDER THE NTA GENERALLY

Compensation in respect of acts that are validated by the NTA or complementary State and Territory legislation must be on "just terms", subject in certain circumstances to the application of principles or criteria for determining compensation under other legislation relating to those acts. Compensation may be monetary or non-monetary (including the transfer of property or the provision of goods or services).

The NTA limits the amount of compensation payable for an act which wholly extinguishes native title to the amount that would be payable for a compulsory acquisition of freehold land over the same area. However, because that limit is expressly subject to the requirement that compensation be on "just terms", the NTA appears open to the possibility that compensation could, in certain circumstances, exceed the freehold value of the relevant land.

The same general principles apply to acts before and after the commencement of the NTA, although the application of the "non-extinguishment principle" to acts after commencement means that liability in those cases should be determined with reference to concepts of inconsistency rather than extinguishment.

DE ROSE

De Rose was one of two compensation applications made on behalf of the De Rose Hill Native Title Holders by two different applicants over two discrete areas:

- a first application, over the area of the 2005 determination ("**Determination Area**"), made by the body corporate set up to hold the native title over that area; and
- a second application, over three parcels of land surrendered or resumed from De Rose Hill Station between 1980 and 1996 (now part of the Stuart Highway, a car park at Agnes Creek and a freehold lot adjacent to the Highway) which were required to be excluded from the Determination Area ("**Excluded Areas**"), made by Peter De Rose and other named individuals.

The Court ordered the parties to participate in mediation over the matters raised by the applications, which ultimately led to a negotiated settlement.

What is in the settlement?

The precise terms of the settlement are set out in a deed that is reproduced in full, except for the quantum of the compensation payment, in a schedule to the determination. The Court agreed to redact the compensation figure to "prevent prejudice to the proper administration of justice", specifically out of concern that disclosure of the figure might impede other negotiations.

The settlement deed includes the following key features:

- a provision to the effect that the deed is not dependent on the making of a determination of compensation but, in the event that a determination is not made in relation to either of the compensation applications, the parties will enter into and register an Indigenous Land Use Agreement in identical terms to the settlement deed;
- acknowledgements that the compensation payment is on "just terms";
- a full and final release of the State from all liability in relation to both the Excluded Areas and, significantly, the Determination Area, notwithstanding that the parties had not been able to reach agreement regarding the "compensable status" of pastoral improvements; and
- an agreement to continue discussions in good faith regarding "non-monetary matters", such as the recording of cultural heritage, signage and rehabilitation but noting that the settlement deed was not in any way contingent on these discussions.

Most of these features are common to native title agreements that seek to discharge prior and prospective liability of compensation for impacts on native title. The key difference between the settlement and equivalent arrangements between State governments and native title holders elsewhere (for example, the agreements between Western Australia and the Yawuru People regarding land around Broome, the recent settlement between Victoria and the Dja Dja Wurrung people around Bendigo and Daylesford and the proposed south west settlement between Western Australia and the Noongar people) is that it does not necessarily require the registration of an Indigenous Land Use Agreement.

In the current circumstances, the State appears to have been satisfied that the risk of any further claim was sufficiently limited and the releases in the settlement deed over both the Determination Area and the Excluded Areas sufficiently robust (when coupled with a determination that compensation was payable in relation to the Excluded Areas), that no further assurances were necessary.

When will the Court permit a determination of compensation by consent?

Even when parties have reached a settlement regarding an application for compensation, the Court must be satisfied that the orders sought are within the power of the Court and otherwise appropriate.

In the absence of "directly relevant" guidance, the Court adopted the same principles as apply to consent determinations of native title, including that:

- it is not necessary to "embark on its own inquiry into the merits of the claim";
- the primary consideration is to determine whether there is agreement and whether it was freely entered into on an informed basis; and
- some consideration of the evidence may be required for the limited purpose of ensuring that the State, Territory or Commonwealth is acting "in good faith and rationally".

These principles can be expected to guide the Court's approach to consent determinations of compensation in future.

In applying these principles, the Court gave consideration to the "extensive negotiations" conducted between the parties, which included discussion around:

- the particular significance to the De Rose Hill Native Title Holders of the land within the Excluded Areas, including with reference to a number of *tjukurrpa* (i.e. "dreamings") associated with that land and traditional uses of that land, such as hunting, camping, gathering or bush tucker and medicine; and
- various calculations and formulae for the valuation of compensation (which had what the Court called "vastly varying results"), including with reference to the value of the relevant freehold lot and associated improvements.

These matters are regular features of agreement-making discussions between native title holders and claimants, governments and industry. However, in the specific context of a compensation application, they highlight the difficulty of ascertaining an inferred freehold value for some land and key matters that may go to the meaning of "just terms" compensation.

What is in the determination?

The first of the applications was dismissed, in accordance with the settlement.

In the second application, the Court determined that:

- native title had been extinguished in the Excluded Areas by the creation of the Highway, the establishment of the car park and the grant of the freehold lot respectively ("**Compensation Acts**");
- had native title not been extinguished, it would have existed in the Excluded Areas and have been held by the De Rose Hill Native Title Holders;
- compensation was payable by the State of South Australia to the body corporate on behalf of the De Rose Hill Native Title Holders in respect of the Compensation Acts, in accordance with the settlement deed; and
- determination of the persons entitled to the compensation, the amount to be given to each person and the resolution of any disputes would be determined in accordance with the rules governing the body corporate.

COMMENT

In addition to being useful for the reasons set out above, *De Rose* also provides a practical demonstration of the way in which compensation applications are shaped by the interaction of provisions of the NTA which require:

- areas in which native title was clearly extinguished prior to 23 December 1996 (including freehold land and areas of public works) to be excluded from any application for a determination of native title; and
- the Federal Court to make a determination of native title in conjunction with any determination of compensation over an area in which native title has not already been determined.

Taken together these provisions make it difficult, at least in the absence of an adjacent determination of native title to provide a level of comfort that claimants can meet the "threshold issue" of proving the existence of native title over the relevant area, to seek compensation over the areas where it is likely to be most attractive to do so. There is a much greater risk of failure, as was the case with a prominent compensation application over the town of Yulara in the Northern Territory in 2006.

In practice, this would seem to suggest that over the medium term the compensation applications that are most likely to progress to determination will be made:

- in relation to land that was required to be excluded from a determination of native title; and
- not by bodies corporate established to hold and/or manage determined native title but by individuals acting with the authorisation of a "compensation claim group" (i.e. in the same manner as applications for determinations of native title), particularly as a consequence of evidentiary requirements which can only be satisfied by a natural person.

The two next most advanced compensation applications currently underway in the Federal Court (over the town of Timber Creek in the Northern Territory and the Gibson Desert Nature Reserve in Western Australia) exhibit both of these features.

MORE INFORMATION

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